80-529

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-.....

IN THE

Supreme Court of the United States

October Term, 1980

CALGON CORPORATION,
Petitioner

v.

LAWRENCE E. DAVIS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, Calgon Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 1, 1980.

QUESTION PRESENTED

Must an Age Discrimination in Employment Act claimant initiate state proceedings within the 180 day period provided by §626(d)(1) of the Act in order to be entitled to the extended 300 day federal filing period which is provided under §626(d)(2) for persons who use state procedures?

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OPINIONS BELOW

The opinion upon rehearing of the Court of Appeals, dated August 1, 1980, not yet officially reported, appears in Appendix C (p. 12a-19a). The original opinion of the Third Circuit, unofficially reported at 22 BNA FEP Cases 1761 (June 10, 1980) appears in Appendix B (p. 2a-11a). The opinion of the United States District Court for the Western District of Pennsylvania, not reported, appears in Appendix A (p. 1a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit, upon rehearing, was entered on August 1, 1980. (App. D p. 20a). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et seq.* (hereinafter referred to as ADEA), will be generally referred to and the specific sections of that act which will be called upon for interpretation and application are as follows:

29 U.S.C. §626(d) provides:

> (d) No civil action may be commenced by any individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged

> unlawful practice occurred; or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. §633(b) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

STATEMENT OF THE CASE

Respondent, Lawrence E. Davis, was employed by Petitioner, Calgon Corporation, in various executive capacities until June 30, 1978, when he was terminated from his job as Assistant to the President.[1]

In the 180 days following his termination, Davis did nothing to initiate either state or federal age discrimination proceedings.

On January 29, 1979 (213 days after his termination), Davis filed a complaint under the Pennsylvania Human Relations Act alleging that he had been discharged due to his age.

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1. This matter came to the District Court for a ruling upon Calgon's motion to dismiss. Thus, the allegations in the Complaint, although not necessarily admitted by Calgon, were accepted as true for the purposes of the motion.

Statement of the Case.

On February 8, 1979 (223 days after his termination), Davis filed a similar charge with the Secretary of Labor under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA").

Subsequently, Davis brought this action alleging that his employment had been terminated in violation of the ADEA and that the District Court had jurisdiction under §626 of the ADEA. Calgon moved the District Court to dismiss the Complaint because Davis had not complied with the requirement of §626(d)(1) of the Act that he take some action within that 180 day period. The District Court found no merit to Davis' contention that he was entitled to take up to 300 days to file his federal charge regardless of when he filed his state charge simply because his action arose in a dual-law state. The District Court granted Calgon's motion to dismiss. (App. A at 1a).

On appeal, the Third Circuit affirmed in a unanimous panel opinion by Chief Judge Seitz. (App. B at 2a). Davis then petitioned for rehearing and, while that petition was pending, this Court decided a case which arose not under the ADEA but under Title VII of the Civil Rights Act of 1964. *Mohasco Corp. v. Silver,* 48 U.S.L.W. 4851 (U.S., June 23, 1980). Although *Mohasco* dealt with a definitional question unique to Title VII,[2] the Third Circuit, in a per curiam rehearing opinion, found controlling two footnotes in *Mohasco.* It stated: "Regardless of what our conclusions would be, we find that the Supreme Court's statements in *Mohasco* control disposition of this issue . . . ."[3] The Third Circuit vacated its original affirmance, reversed, and this Petition followed.

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2. *Mohasco Corp. v. Silver,* 48 U.S.L.W. at 4851.
3. App. C at 18a.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Circuit Courts of Appeal.

The Third Circuit's judgment is in square and irreconcilable conflict with decisions of the First[4] and Sixth[5] Circuits on this same issue.

In all three cases, the ADEA plaintiff's action arose in a dual-law state, one which had a state law (as well as the federal law) prohibiting age discrimination in employment.[6] In all three cases, the plaintiff did nothing to initiate state or federal proceedings within 180 days after the termination of his employment but filed his federal charge before 300 days had elapsed.

The First and Sixth Circuits held, as did the Third Circuit originally,[7] that the extended 300 day period for filing the federal charge is available only to persons whose actions arise in dual-law states and who initiate

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4. *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), *pet. for cert. pending,* No. 79-1970 (filed June 16, 1980).

5. *Ewald v. Great Atl. & Pac. Tea Co., Inc.*, 620 F.2d 1183 (6th Cir. 1980), *pet. for cert. pending,* No. 80-208 (filed August 4, 1980).

6. Inasmuch as the ADEA, unlike Title VII, contains no deferral provisions, it is both erroneous and misleading to employ the Title VII jargon of "deferral" vs. "non-deferral" states in an ADEA context. That terminology has no application under the ADEA. The appropriate distinction under the ADEA, and employed in this Petition, is a "dual-law" state (one which has a state law, as well as the ADEA, prohibiting age discrimination in employment) vs. a "federal-law only" state.

7. App. B at 2a.

state proceedings within the normal, 180 day, federal filing period. This application of these ADEA provisions was the only one which squared with the Congressional intent to provide an additional period for filing the federal charge when state proceedings had already been commenced[8] and which made the length of the federal filing period dependent upon the plaintiff taking action to notify the defendant of his claim, not upon state law.

Upon rehearing, the Third Circuit adopted a squarely contrary rule. It held that a plaintiff whose claim arises in a dual-law state is entitled to the extended 300 day period to file his federal charge even if he did not initiate either state or federal proceedings in the 180 day period. In so ruling, the Third Circuit reached the same result as had the Ninth Circuit in an earlier decision which, however, did not focus clearly on the issue presented in this case.[9]

These four Circuit Court decisions present a conflict which can be resolved only by this Court.

The conflict is an important one because a defendant's right to prompt notice of an ADEA claim against it now depends upon the Circuit in which the action arises and, if the case arises in the Third or Ninth Circuit, upon whether the state has a law prohibiting age discrimination in employment. Defendants in the First and Sixth Circuits are entitled to notice of the filing of either a federal or state charge within 180 days regardless of state law; a Third or Ninth Circuit plaintiff in a

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8. Petition, *infra,* at 9-11.

9. *Bean v. Crocker Nat'l Bank,* 600 F.2d 754, 759 (9th Cir. 1979). Petition, *infra,* at 12-14.

dual-law state may wait up to 300 days to give his initial notice.

The need for a uniform rule on this issue justifies the grant of certiorari to review the judgment below.

2. The Third Circuit's Judgment Conflicts With This Court's Reasoning In Its Most Recent ADEA Case And With The ADEA's Legislative History And Was Based Upon An Incorrect Application Of Footnotes In A Decision Under Another Statute.

The Third Circuit's opinion conflicts with Congressional intent to provide the extended filing period only to persons who had commenced state proceedings in the 180 day period. It also conflicts with this Court's recognition, in its most recent ADEA decision, of those Congressional purposes. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979). These conflicts resulted from the Third Circuit's incorrect, although reluctant, application of footnotes from this Court's decision involving another statute in which Congress enacted a different scheme. *Mohasco Corp. v. Silver,* 48 U.S.L.W. 4851 (U.S., June 23, 1980).

The Third Circuit applied *Mohasco* much too broadly. *Mohasco* was not an ADEA case at all. It was a Title VII case which presented the narrow question of the Congressional intent underlying the word "filed" as that word appeared in two different subsections of §706 of Title VII, 42 U.S.C. §2000e-5.[10] That issue cannot arise under the ADEA, even though there are some similarities between the charge or notice filing provisions in Title VII and the ADEA.

More striking than these similarities, however, are the differences between these two statutes—differences

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10. *Mohasco Corp. v. Silver,* 48 U.S.L.W. at 4851.

which have been specifically recognized by an earlier decision of this Court and which are critical to the disposition of the present case. As this Court noted in *Oscar Mayer,*[11] Title VII's statutory scheme mandates *sequential* filing of state and federal charges and requires an initial 60 day period of exclusive state jurisdiction. Title VII charges lodged initially with the EEOC must be "deferred" to the state or local deferral agency, if one exists. The ADEA, on the other hand, provides for no period of exclusive state jurisdiction, but rather permits *concurrent* state and federal administrative jurisdiction.

There is no "deferral" provision or requirement under the ADEA.

The rationale of this Court's decision in *Mohasco*—ordinarily requiring a filing of state charges in Title VII deferral states within 240 days of the event complained of—is entirely premised upon this Title VII 60 day period of exclusive state jurisdiction. In short, the reasoning of this Court was that a Title VII deferral state complainant must file state charges within 240 days inasmuch as delay beyond this 240 day period would render it impossible for the complainant to meet Title VII's requirement of a 60 day period of exclusive state jurisdiction while, at the same time, meeting the extended 300 day federal filing period applicable in Title VII deferral state situations.[12]

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11. 441 U.S. at 756.

12. The only exception to this 240 day filing period would occur if a claimant filed beyond the 240 day period and the state or local agency happened to complete its processing of the charge within the 60 days remaining until the expiration of the extended 300 day period. *Mohasco Corp. v. Silver,* 48 U.S.L.W. at 4852-53 n.16.

Obviously, inasmuch as the ADEA contains no period of exclusive state jurisdiction over, and no requirement of deferral of, complaints of age discrimination, the logic of the Court's *Mohasco* decision has no application under the ADEA. Stated differently, the 240 day period which figures so prominently in the Court's decision in *Mohasco* has no relevance or application at all under the ADEA. The court below erred in applying that Title VII decision to this case, which arose under a different statutory scheme.

Moreover, the Third Circuit's decision conflicts with this Court's reasoning in *Oscar Mayer*. Although the issue presented in this case is quite different from the one presented in *Oscar Mayer*,[13] it was noted by the First[14] and Sixth[15] Circuit Courts of Appeal and by the Third Circuit in its original opinion[16] that at least one footnote statement of this Court in *Oscar Mayer* indicates that had this Court faced the question now pre-

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13. In this case, the question is whether an ADEA claimant in a dual-law state who filed neither a state nor federal charge in the first 180 days after his termination was entitled to §626(d)(2)'s extended 300 day federal filing period provided for those who use state procedures. That question was not presented to this Court in *Oscar Mayer* since the claimant there had filed with the federal agency within 180 days of the alleged act of discrimination. The complainant in *Oscar Mayer* did not need the benefit of the extended 300 day period of §626(d)(2) in order to be timely and the only question presented there was whether a timely state filing was an ADEA jurisdictional prerequisite.

14. *Ciccone v. Textron, Inc.*, 616 F.2d 1216, 1221 (1st Cir. 1980).

15. *Ewald v. Great Atl. & Pac. Tea Co., Inc.*, 620 F.2d 1183, 1186 n.3 (6th Cir. 1980).

16. App. B at 9a, n.3.

sented, it would have decided the matter as did the First and Sixth Circuits—and as the Third Circuit did originally. In footnote 11 of the *Oscar Mayer* opinion, this Court stated:

> "In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor." (Citations omitted.) 441 U.S. at 764 n.11.

The Third Circuit's ruling that persons whose claims arise in dual-law states need do nothing at all in the first 180 days to preserve their federal rights is inconsistent with that statement in *Oscar Mayer*.

In addition to the conflict between the Third Circuit's decision and the prior decisions of this Court, an application of the underlying considerations and principles announced by this Court in *Mohasco* and *Oscar Mayer* requires reversal of the decision reached by the Third Circuit.

As this Court noted in *Mohasco*, the purpose of the Title VII extended filing period in deferral states was to accommodate the required initial 60 days of exclusive state jurisdiction while, at the same time, preventing a forfeiture of a complainant's federal rights. Since the ADEA permits concurrent filings and does not require deferral, the extended filing period in dual-law states is not necessary under the ADEA to protect complainants against any loss of federal rights. In effect, the Third Circuit concluded that Congress, nevertheless, kept the extended 300 day filing period under the ADEA (while

eliminating the sequential filing required by Title VII) simply to provide an arbitrary 120 day period as a "windfall" to complainants whose actions arise in a state where state law prohibits age discrimination in employment. Under the Third Circuit's interpretation of the Act, a complainant whose claim arises in a federal-law only state must file his charge within 180 days of the act complained of, whereas a complainant in a dual-law state—simply because his action arises in a state where state law prohibits age discrimination in employment—can delay for 300 days before filing any charge anywhere.[17]

The legislative history suggests no such irrational Congressional scheme. The history shows that Congress assumed that the extended 300 day ADEA filing period would be available as an accommodation only to those who voluntarily chose to file with the state *during the initial federal filing period.* In no event would this extended filing period be available to someone who, like Respondent, delayed more than 180 days before initiating any state proceeding:

> "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of

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17. If, as the Third Circuit ruled, Congress intended that dual-law state complainants would automatically have the benefit of the extended 300 day filing period merely by virtue of their residing in a dual-law state—and without their doing anything further—it is difficult to discern why Congress would so discriminate against federal-law only state complainants by requiring considerably greater diligence (i.e., filing within 180 days) from such persons. It would have been a very simple matter for Congress to have treated all alike by enacting a consistent 300 day filing period applicable to all.

> Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a State statute this period shall be *extended* to 300 days." (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31251 (1967).
>
> "[T]he notice to be filed by an individual who wishes to bring suit must be filed within 180 days of the occurrence of the alleged unlawful practice, except that where a State *has undertaken action* in accordance with its laws, an individual must file his notice within 300 days of the alleged unlawful practice." (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31252 (1967) (Section by Section Analysis).

As noted above, in the present case, Respondent did not initiate state proceedings within 180 days of his termination; hence, no state had "undertaken action" or "commenced" processing his charge until after the 180 day period had expired.

Furthermore, this Court and various Circuit Courts have concluded that the relatively short filing periods under the ADEA and Title VII were for the benefit of employers. *Mohasco Corp. v. Silver,* 48 U.S.L.W. at 4854; *Powell v. Southwestern Bell Tel. Co.,* 494 F.2d 485, 488 (5th Cir. 1974); *Dartt v. Shell Oil Co.,* 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd by an equally divided Court,* 434 U.S. 99 (1977). Specifically, such short periods insure prompt notice to the employer of the claim and permit early efforts to resolve the matter or an early opportunity for the employer to gather or to preserve evidence necessary to defend against the claim.

Contrary to the Third Circuit's interpretation of the ADEA filing provisions, there is no reason to believe that Congress intended that employers in certain states have, or need, less notice than employers in other states. Moreover, this Court specifically noted in *Mohasco* that, even under Title VII's filing provisions:

> "(Nothing) in the legislative history contains any 'suggestion that complainants in some States were to be allowed to proceed with less diligence than those in other states.' " 48 U.S.L.W. at 4854.

Additionally, this Court noted in *Oscar Mayer* that the rationale for the Congressional decision to permit concurrent filings under the ADEA, rather than the mandatory sequential filings of Title VII, was to avoid the delay occasioned by Title VII's sequential filing scheme and to permit more expedited processing of age claims.[18]

The Third Circuit's interpretation of the ADEA filing provisions would produce the reverse result (*i.e.*, would permit less diligence and more delay from an ADEA dual-law state claimant than from a Title VII deferral state claimant). Under the Third Circuit's interpretation, an ADEA dual-law state complainant would automatically have 300 days to file his charge whereas a Title VII deferral state complainant must file his charge within 240 days to insure timeliness, *Mohasco Corp. v. Silver, supra.* This result is entirely inconsistent with Congressional intent as discussed by this Court in *Oscar Mayer.*

Finally, although the Third Circuit reached the same result as the Ninth Circuit had earlier, the Ninth

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18. *Oscar Mayer & Co. v. Evans,* 441 U.S. at 757.

Circuit's decision is not persuasive precedent. *Bean v. Crocker Nat'l Bank,* 600 F.2d 754, 759 (9th Cir. 1979). The issue presented here, and in *Ciccone* and *Ewald,* was merely a side issue in *Bean,* applicable to only one of eleven named plaintiffs in a complicated class action purportedly brought on behalf of more than 1,000 terminated persons. The Ninth Circuit in *Bean* analyzed no ADEA decision other than this Court's decision in *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), and the Ninth Circuit did not have the benefit of either briefs or argument of counsel regarding the impact of *Oscar Mayer.*

In *Bean,* the primary issue before the Ninth Circuit was whether state filing was a prerequisite to a federal suit brought under the ADEA. The *Oscar Mayer* opinion held state filing mandatory but held that compliance with state filing limitations periods was irrelevant to ADEA jurisdictional questions. The rationale for this holding was that a contrary ruling would result in the diverse state filing limitations periods, in essence, displacing the federal limitations period.

The *Bean* court, without noting the rationale of *Oscar Mayer,* concluded that the *Oscar Mayer* holding that "state limitations periods are irrelevant" compelled the conclusion that an ADEA claimant in a state with a state law prohibiting age discrimination in employment is automatically entitled to 300 days in which to file with the federal agency.

The issue involved in this case, however, does not relate to compliance with state limitations periods. Instead, the issue is whether an ADEA claimant is permitted an additional 120 days to pursue his claim merely by virtue of his being in a dual-law state or, alterna-

tively, whether he must actually resort to the state agency within the basic 180 day filing period provided by §626(d)(1) in order to obtain the extended period provided by §626(d)(2). The only filing periods in question here are federal. The Ninth Circuit did not consider the question in that context and consequently did not consider the appropriate legislative history and appropriate Congressional purposes in question. In short, the Ninth Circuit's focus was on a question different from that addressed by the First, Third and Sixth Circuits.

Thus, the Ninth Circuit did not consider and the Third Circuit departed from this Court's recognition of Congress' intent to limit the availability of the extended 300 day period to those who had commenced state proceedings within the normal, 180 day, period. The Third Circuit's departure justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. DAVIS
Plaintiff,
v.
CALGON CORP., a corporation
Defendant.

C. A. No. 79-632-Q

ORDER

AND NOW, this 21st day of September, 1979, upon consideration of defendant's motion to dismiss, and of briefs in support thereof and in opposition thereto, and the Court being of opinion that under 29 U.S.C. 626(d) the 300 day filing period in States with State agencies dealing with age discrimination cases was intended to afford the State agency time to process cases where timely invocation of the State remedy occurred, and not in cases where such invocation did not take place.

IT IS ORDERED that said motion be and the same hereby is granted and that the above-styled action be and the same hereby is dismissed.

/s/ EDWARD DUMBAULD
.....
United State Senior District Judge

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APPENDIX B

Original Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2606

LAWRENCE E. DAVIS, *Appellant*
v.
CALGON CORPORATION, a corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 79-0692)

Argued March 19, 1980
Before: SEITZ, *Chief Judge,* and WEIS and
HIGGINBOTHAM, *Circuit Judges*
(Filed June 10, 1980)

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

Plaintiff Lawrence E. Davis appeals from a final order of the district court that granted defendant Calgon Corporation's motion to dismiss. The district court dismissed plaintiff's age discrimination complaint because it found that plaintiff had not satisfied the preconditions to suit specified in the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (1976) (ADEA).

I.

Plaintiff's complaint alleges that plaintiff was employed as an executive by defendant from 1967 until his employment was terminated on June 30, 1978, at age 55. Plaintiff asserts that this discharge violated the ADEA[1] because it was done in furtherance of a general corporate policy adopted by defendant of demoting and terminating its executives solely on account of age and replacing them with individuals under the age of 40.

On January 29, 1979, 213 days after his discharge, plaintiff filed a complaint alleging age discrimination with the Pennsylvania Human Relations Commission (the PHRC). Ten days later, he filed a charge with the Secretary of Labor (the Secretary). After receiving notice from the PHRC that it had terminated state proceedings and from the Secretary that he had concluded conciliation efforts, plaintiff filed suit in the district court.

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1. Although plaintiff's complaint also refers to the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* (1976), we do not read his factual recitals to assert an independent cause of action or claim for relief under this statute.

Defendant moved to dismiss plaintiff's complaint on the ground that plaintiff had not filed his charge with the Secretary within the time limits prescribed in the ADEA, 29 U.S.C.A. §626(d) (West 1979 Supp.). Section 626(d) provides that such a charge shall be filed:

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Section 633(b), which deals with the relationship between federal and state age discrimination actions, applies to ADEA claims based on alleged unlawful practices occurring in "deferral states." These are states having a law prohibiting age discrimination in employment and establishing a state authority to grant or seek relief from such discrimination.

Plaintiff filed both his state and federal claims after 180 days but before 300 days. Because Pennsylvania is a deferral state, *see Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Pa. Stat. Ann. tit. 43, §§955-957 (Purdon 1964 & 1979 Supp.), plaintiff argues that he is entitled to the 300-day period specified in §626(d)(2) and that therefore his charge of age discrimination was timely filed with the Secretary. The district court disagreed, finding that the 300-day filing period was available only where "timely invocation of the State remedy occurred." The court found that plaintiff's filing with the PHRC was not timely and that a 180-day period for filing with

the Secretary applied in this case. Therefore, it concluded that plaintiff's failure to file a charge with the Secretary within the 180 days precluded this suit.

II.

The basis of the district court's conclusion that plaintiff's filing with the PHRC was not timely is unclear. The court may have found the filing untimely either because plaintiff did not file with the PHRC within the 90-day state statute of limitations, *see* Pa. Stat. Ann. tit. 43, §959 (Purdon 1979 Supp.), or because he did not make the state filing within 180 days. We are unable to determine which of these time limits was relied upon by the district court. Therefore, we must consider both of them to determine whether the district court's decision to dismiss plaintiff's complaint was correct.

A.

In *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), the Supreme Court held that although the ADEA makes resort to state procedures mandatory for claims arising in deferral states, a plaintiff is not required to commence the state proceedings within the time limits set by state law to preserve his federal remedy. The Court stated that "state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy." *Id.* at 762. Therefore, plaintiff's failure here to comply with the state statute of limitations cannot bar his ADEA suit and cannot support the district court's decision.

B.

Defendant argues, however, that the extended period for filing a charge with the Secretary provided in

§626(d)(2) applies only when a plaintiff files with the state within the shorter federal period of 180 days and that the district court based its decision on plaintiff's failure to file with the state within this period. Thus, defendant contends that the district court properly granted its motion to dismiss because plaintiff did not file with the PHRC until more than 180 days after his discharge and, consequently, that plaintiff was not entitled to 300 days to file with the Secretary.

This issue did not arise in *Evans* and was not addressed by the Court because the plaintiff there had filed his federal charge within 180 days after the alleged discrimination. Thus, we must decide whether a deferral state plaintiff who has not filed a complaint with the appropriate state agency within 180 days after the alleged unlawful practice nevertheless is entitled to the extended period provided by §626(d)(2) to file a charge with the Secretary.[2]

Initially, we note that the parties have cited nothing in the legislative history of the ADEA and our research has revealed nothing in that history that is helpful to the resolution of this issue. Plaintiff relies on the statutory

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2. Defendant asserts that two prior decisions of this court control our determination of this issue. *See Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (in banc); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In *Holliday*, the plaintiff filed with the Secretary 168 days after his discharge. Thus, we were not presented with any question concerning the applicability of the extended filing period. Defendant also relies on a footnote in *Bonham*. *See* 569 F.2d at 192 n.5. We are unsure, however, whether the statement in this footnote survives the Supreme Court's decision in *Evans*, and therefore, we choose not to rely on it in this case.

language of §626(d)(2) and argues that the plain terms of that subsection give deferral state plaintiffs 300 days to file a charge with the Secretary regardless of when a state administrative complaint is filed.

A reading of only the isolated language of §626(d)(2) (quoted above) lends some support to the plaintiff's theory. However, it is

> fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or a member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

Richards v. United States, 369 U.S. 1, 11 (1962) (footnotes omitted) (quoting *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 285 (1956)). *See Kokoszka v. Belford,* 417 U.S. 642, 650 (1974). Thus, we must consider the extended filing period provided by §626(d)(2) in light of the overall structure and purposes of the ADEA.

Section 633(b) provides that in cases occurring in deferral states, no suit may be brought under §626 until 60 days after proceedings have been commenced under state law, unless state proceedings have terminated earlier. This section evidences a congressional intent to encourage settlement of age discrimination claims at the state level prior to federal court litigation. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756 (1979); *Ewald v. Great Atlantic & Pacific Tea Co.,* No. 77-1600, slip op. at 2 (6th Cir. May 9, 1980).

This same purpose is evident in §626(d). Section 626(d)(1) gives plaintiffs in non-deferral states 180

days to file a charge with the Secretary. By contrast, in cases to which §633(b) applies, §626(d)(2) allows a deferral state plaintiff to file with the Secretary within either 300 days or 30 days after he has received notice of termination of state proceedings, whichever occurs earlier. Given Congress's intent to encourage the resolution of age discrimination claims in state proceedings, it is apparent that the purpose underlying the extended filing period of §626(d)(2) is to give deferral state plaintiffs an additional period in which to pursue state remedies before being required to file a charge with the Secretary.

This purpose is not furthered by giving a deferral state plaintiff extra time to file his charge with the Secretary when he does not commence state proceedings. Furthermore, the rule that plaintiff asks us to adopt in this case would create an obvious inequity in the treatment of deferral and non-deferral state plaintiffs because it would give a deferral state plaintiff up to 120 days longer than a non-deferral state plaintiff to file an identical claim, even when the deferral state plaintiff has not tried to initiate state proceedings. We cannot ascribe to Congress an intent to arbitrarily allow one individual 300 days to file a charge because of the fortuitous circumstance that his claim arose in a deferral state when another individual in a non-deferral state must file the same charge within 180 days after the alleged discrimination. Rather, we conclude from the structure of the ADEA and its policy favoring settlement of age discrimination complaints in state proceedings that Congress intended that a deferral state plaintiff be entitled to the extended filing period of §626(d)(2) only if he filed a

charge with the state within 180 days after the alleged discriminatory conduct.[3]

This construction of the statute imposes on both deferral and non-deferral state plaintiffs the same basic time limit for preserving their federal remedy. The non-deferral state plaintiff must file a charge with the Secretary within 180 days. A deferral state plaintiff may file either with the Secretary or the appropriate state agency within this same period. If he chooses to file with the state within 180 days, then he may take advantage of the additional time for filing with the Secretary provided in §626(d)(2).

Plaintiff points out that the Court of Appeals for the Ninth Circuit has rejected the construction of §626(d) that we accept in this case. *See Bean v. Crocker National Bank,* 600 F.2d 754 (9th Cir. 1979). However, since this appeal was filed, two other courts of appeals have decided this issue and have followed the interpretation we adopt today. *See Ewald v. Great Atlantic & Pacific Tea Co.,* No. 77-1600 (6th Cir. May 9, 1980); *Ciccone v. Textron, Inc.,* No. 79-1541 (1st Cir. March 17, 1980). Moreover, we have recognized that interpretations of similar language in Title VII can provide guidance for interpretation of the ADEA, *see Ricks v. Delaware State College,* 605 F.2d 710, 712 (3d Cir. 1979), *cert. granted,* 100 S.Ct. 1012 (1980), and several courts have construed

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3. The fact that Pennsylvania has a statute of limitations that is shorter than 180 days does not undercut the ADEA's purpose to give the states an initial opportunity to process age discrimination claims. As the Supreme Court noted in *Oscar Mayer & Co.,* if the states are concerned with the possible bypass of their procedures, they may "readily avoid [that] possibility by extending their limitations periods." 441 U.S. at 764 n.11.

similar Title VII time limits for filing claims with the EEOC in this fashion. *See, e.g., Olson v. Rembrandt Printing Co.,* 511 F.2d 1228 (8th Cir. 1975) (in banc); *Wiltshire v. Standard Oil Co.,* 447 F. Supp. 756 (N.D. Cal. 1977). *But see Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976). While the issue is not free from doubt, we agree with the reasoning of *Ewald, Ciccone,* and *Olson.*

C.

We recognize that the ADEA is remedial and humanitarian legislation that should be liberally construed to avoid the creation of procedural technicalities, especially where laymen, unassisted by trained counsel, often initiate the process. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 761 (1979). However, our holding does not create undue procedural obstacles for victims of age discrimination. As noted above, our construction of the statute merely places the same duty on deferral and non-deferral state plaintiffs to protect their federal remedy.

Moreover, we have held that the time limits imposed by §626(d) are not strictly jurisdictional but instead are in the nature of statutes of limitations and therefore subject to possible tolling and estoppel in proper cases. *Bonham v. Dresser Industries, Inc.,* 569 F.2d 187, 192-93 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). This provides additional protection to the layman who seeks to remedy an age discrimination claim.

III.

In sum, because the plaintiff did not file a complaint with the PHRC within 180 days after his discharge, he

was not entitled to the extended 300-day period to file a charge with the Secretary. Therefore, his charge, which was filed 223 days after his discharge, was not timely, and the district court properly dismissed his complaint.

Accordingly, the order of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C

Rehearing Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2606

LAWRENCE E. DAVIS,
Appellant

v.

CALGON CORPORATION, a corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 79-0692)

Argued March 19, 1980

Panel Rehearing Granted July 1, 1980
Resubmitted under Third Circuit Rule 12(6)
July 8, 1980

Before: SEITZ, *Chief Judge,* and WEIS and HIGGINBOTHAM, *Circuit Judges*

(Filed August 1, 1980)

PAUL H. TITUS, ESQ., (Argued)
BERNARD D. MARCUS, ESQ.,
ESTELLE F. COMAY, ESQ.,
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Attorneys for Appellant

EDWARD N. STONER II, ESQ., (Argued)
ROBERT E. SHEEDER, ESQ.,
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pa. 15219
Attorneys for Appellee

OPINION OF THE COURT

PER CURIAM:

Plaintiff Lawrence E. Davis appeals from a final order of the district court that granted defendant Calgon Corporation's motion to dismiss. The district court dismissed plaintiff's age discrimination complaint because it found that plaintiff had not satisfied the preconditions to suit specified in the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (1976) (ADEA).

I.

Plaintiff's complaint alleges that he was employed as an executive by defendant from 1967 until his employment was terminated on June 30, 1978, at age 55. Plaintiff asserts that his discharge violated the ADEA[1] because it was done in furtherance of a general corporate policy adopted by defendant of demoting and terminating its executives solely on account of age and replacing them with individuals under the age of 40.

On January 29, 1979, 213 days after his discharge, plaintiff filed a complaint alleging age discrimination with the Pennsylvania Human Relations Commission (the PHRC). Ten days later, he filed a charge with the Secretary of Labor (the Secretary).[2] After receiving

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1. Although plaintiff's complaint also refers to the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* (1976), we do not read his factual recitals to assert an independent cause of action or claim for relief under this statute.

2. At that time, the ADEA required the plaintiff to file a charge with the Secretary. *See* 29 U.S.C.A. §626(d) (West 1979 Supp.). Under Reorg. Plan. No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) (effective July 1, 1979), all functions vested in the Secretary under

notice from the PHRC that it had terminated state proceedings and from the Secretary that he had concluded conciliation efforts, plaintiff filed suit in the district court.

Defendant moved to dismiss plaintiff's complaint on the ground that plaintiff had not filed his charge with the Secretary within the time limits prescribed in the ADEA, 29 U.S.C. §626(d) (West 1979 Supp.). Section 626(d) provides that such a charge shall be filed:

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Section 633(b), which deals with the relationship between federal and state age discrimination actions, applies to ADEA claims based on alleged unlawful practices occurring in "deferral states." These are states having a law prohibiting age discrimination in employment and establishing a state authority to grant or seek relief from such discrimination.

Plaintiff filed both his state and federal claims after 180 days but before 300 days. Because Pennsylvania is a deferral state, *see Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978); Pa. Stat. Ann. tit. 43, §§955-957 (Purdon

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§626(d) were transferred to the EEOC. Because this case arose prior to the effective date of the reorganization, we will refer only to the Secretary in this opinion.

1964 & 1979 Supp.), plaintiff argues that he is entitled to the 300-day period specified in §626(d)(2) and that therefore his charge of age discrimination was timely filed with the Secretary. The district court disagreed, finding that the 300-day filing period was available only where "timely invocation of the State remedy occurred." The court found that plaintiff's filing with the PHRC was not timely and that a 180-day period for filing with the Secretary applied in this case. Therefore, it concluded that plaintiff's failure to file a charge with the Secretary within 180 days precluded this suit.

II.

The basis of the district court's conclusion that plaintiff's filing with the PHRC was not timely is unclear. The court may have found the filing untimely either because plaintiff did not file with the PHRC within the 90-day state statute of limitations, *see* Pa. Stat. Ann. tit. 43, §959 (Purdon 1979 Supp.), or because he did not make the state filing within 180 days. We are unable to determine which of these time limits was relied upon by the district court. Therefore, we must consider both of them to determine whether the district court's decision to dismiss plaintiff's complaint was correct.

A.

In *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), the Supreme Court held that although the ADEA makes resort to state procedures mandatory for claims arising in deferral states, a plaintiff is not required to commence the state proceedings within the time limits set by state law to preserve his federal remedy. The Court stated that "state procedural defaults cannot foreclose federal

relief and that state limitations periods cannot govern the efficacy of the federal remedy." *Id.* at 762. Therefore, plaintiff's failure here to comply with the state statute of limitations cannot bar his ADEA suit and cannot support the district court's decision.

B.

Defendant argues, however, that the extended period for filing a charge with the Secretary provided in §626(d)(2) applies only when a plaintiff files with the state within the shorter federal period of 180 days and that the district court based its decision on plaintiff's failure to file with the state within this period. It contends that the district court properly granted its motion to dismiss because plaintiff did not file with the PHRC until more than 180 days after his discharge and, consequently, that plaintiff was not entitled to 300 days to file with the Secretary.[3]

Defendant relies on a number of cases decided under both Title VII and the ADEA that have construed the filing limits for these statutes to require deferral state plaintiffs to file with the state within the 180 day

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3. Defendant asserts that two prior decisions of this court control our determination of this issue. *See Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (in banc); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In *Holliday*, the plaintiff filed with the Secretary 168 days after his discharge. Thus, we were not presented with any question concerning the applicability of the extended filing period. Defendant also relies on a footnote in *Bonham*. *See* 569 F.2d at 192 n.5. We are unsure, however, whether the statement in this footnote survives the Supreme Court's decision in *Evans*, and therefore, we choose not to rely on it in this case.

federal period to be entitled to an extended period for filing with the proper federal authority. *See, e.g., Ewald v. Great Atlantic & Pacific Tea Co.,* No. 77-1600 (6th Cir. May 9, 1980) (ADEA); *Ciccone v. Textron, Inc.* 616 F.2d 1216 (1st Cir.), *petition for cert. filed,* 48 U.S.L.W. 3839 (June 24, 1980) (No. 79-1970) (ADEA); *Olson v. Rembrandt Printing Co.,* 511 F.2d 1228 (8th Cir. 1975) (in banc) (Title VII). However, since the present case was argued in this court, the Supreme Court has expressly rejected the reasoning of these cases and adopted a literal reading of the filing provisions of Title VII. *See Mohasco Corp. v. Silver,* 48 U.S.L.W. 4851 (June 23, 1980).

Although the precise issue presented in *Mohasco* concerned the meaning of the term "filed" in subsections (c) and (e) of §706 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c),(e) (1976), The Court examined *Olson* and its progeny in two footnotes. 48 U.S.L.W. at 4852-53 n. 16, 19. It found that the *Olson* court's interpretation of the time limits imposed by §706(e) was not supported by the statute because "Congress included no express requirement that state proceedings be initiated by any specific date in the portion of [subsection (e)] that relates to time limitations in deferral States." *Id.* at 4853 n. 19. The Court concluded by stating that:

> we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include . . . at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Id. (quoting *Love v. Pullman Co.,* 404 U.S. 522, 527 (1972)).

While *Mohasco* involved the time limitations of Title VII, we find the Supreme Court's statements equally applicable to the ADEA. First, we have recognized that interpretations of similar language in Title VII can provide guidance for interpretation of the ADEA. *See Ricks v. Delaware State College,* 605 F.2d 710, 712 (3d Cir. 1979) (applying rule for when time limitations of ADEA begin to run to similar time limits in Title VII), *cert. granted,* 100 S. Ct. 1012 (1980). *See also Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756 (1979).

Moreover, in its discussion rejecting the *Olson* approach, the Court also cited *Ciccone v. Textron, Inc., supra,* a case that relied on *Olson* to hold that an ADEA plaintiff must file with the state within 180 days to be entitled to the extended filing period of §626(d)(2). Finally, the ADEA, like Title VII, is a statutory scheme in which laymen, unassisted by counsel, often initiate the process. *See Oscar Mayer & Co. v. Evans,* 441 U.S. at 761.

Nothing in the language of §626(d)(2) imposes on deferral state plaintiffs a duty to file with the state within 180 days to be entitled to the extended filing period in which to file with the Secretary. Regardless of what our own conclusions would be, we find that the Supreme Court's statements in *Mohasco* control disposition of this issue, and we refuse to "read in a time limitation provision that Congress has not seen fit to include." Therefore, we hold that a plaintiff in a deferral state is entitled to the extended period provided by §626(d)(2) regardless of whether he has filed a state administrative complaint within 180 days after the alleged discrimination occurred. *Accord, Bean v. Crocker National Bank,* 600 F.2d 754 (9th Cir. 1979). Because the plaintiff in this

case filed a charge with the Secretary 223 days after his discharge, his filing was timely, and the district court erred in dismissing his complaint.

III.

The order of the district court dismissing plaintiff's complaint will be reversed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

Court of Appeals Judgment on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2606

LAWRENCE E. DAVIS,
Appellant

vs.

CALGON CORPORATION, a corporation

(D. C. Civil No. 79-0692)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Present: SEITZ, *Chief Judge* and WEIS AND HIGGINBOTHAM, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 19, 1980 and later resubmitted under Third Circuit Rule 12(6) for panel rehearing on July 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 21, 1979, be, and the same is hereby reversed in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:
SALLY MRVOS
Clerk

August 1, 1980

FILED
JAN 5 1981

No. 80-529

IN THE

Supreme Court of the United States

October Term, 1980

CALGON CORPORATION,
Petitioner

v.

LAWRENCE E. DAVIS,
Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD N. STONER II
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Counsel for Petitioner,
CALGON CORPORATION

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

STATEMENT REQUIRED BY RULE 28.1:

Petitioner, CALGON Corp., is a wholly-owned subsidiary of Merck & Co., Inc. CALGON has no subsidiaries. Merck's other wholly-owned subsidiaries are:

Baltimore Aircoil Co., Inc.
- Baltimore Aircoil (Australia) Pty.Ltd.
- Baltimore Aircoil Interamerican Corp.
- Baltimore Aircoil-Chemviron N.V./S.A.
- BAC-Pritchard Inc.

Calgon Corp.
- Calgon Interamerican Corp.
- Calgon Interamerican C.A.
- Chemviron S.A.
- Chemviron Ltd.
- Proveedores Tecnicos S.A. de C.V.

Chibret Limitada (90%)
Compagnie Chimique Merck Sharp & Dohme, S.A.
Charles E. Frosst & Co. (Middle East) S.A.L.
Frosst Laboratories, Inc.
Hubbard Farms, Inc.
- Hubbard Foods, Inc.
- Hubbard International Sales Corp.
- Hubbard Europa B.V.
- Spafas, Inc.

International Indemnity Ltd.
Kelco Co.
- Monterey Kelp Corp.
- Scotia Marine Products Ltd.

Laboratoires Merck Sharp & Dohme, S.A.
- Laboratoires Chibret, S.A.

Merck & Co., Inc.
Merck Farms, Inc.
Merck Sharp & Dohme (Argentina) S.A.
- Industrialy Commercial

Merck Sharp & Dohme (Australia) Pty. Ltd.
Merck Sharp & Dohme B.V.
Merck Sharp & Dohme (Belgium) S.A.
Merck Sharp & Dohme Canada Limited
Merck Sharp & Dohme de Espana, S.A.E.

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SUPPLEMENT TO REASONS FOR GRANTING THE WRIT

This Court's Recent Decision In Ricks Emphasizes That A Writ Of Certiorari Should Be Granted In This Case

Remarks in each of the three opinions in a recent decision by this Court emphasize the Third Circuit's error in holding that its disposition of this Age Discrimination in Employment Act ("ADEA") case was "controlled" by two footnotes in *Mohasco,* a Title VII case. *Delaware State College v. Ricks,* —— U.S. ——, 242 BNA Daily Lab. Rep. D-1 (Dec. 15, 1980).

In *Ricks,* a Title VII case, each Justice[1] indicated that this Court *has not previously ruled* that a plaintiff who files an untimely state charge and who files no

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1. "[W]e need not decide whether Ricks was entitled to 300 days to file under Title VII [simply because Delaware is a state with its own fair employment practices agency]." Opinion of Justice Powell n. 13. *"Under certain circumstances,* the filing is extended to 300 days." (Emphasis added.) Opinion of Justice Powell n. 7. (Justice Powell's opinion was joined in by Chief Justice Burger and Justices White, Blackmun and Rehnquist.)

"Title VII would allow Ricks 300 days if he had 'initially instituted' proceedings with a local or state agency with authority to grant him relief. 42 U.S.C. § 2000e-5(b); see *Mohasco Corp. v. Silver,* —— U.S. ——, ——. *To benefit from this provision, however, Ricks would arguably have had to make a timely filing with the state agency."* (Emphasis added.) Opinion of Justice Stewart n. 2. (Justice Stewart's opinion was joined in by Justices Brennan and Marshall.)

"Because the employee must file a charge with the EEOC within 180 days after the occurrence, the Court's analysis will necessitate the filing of a charge while the teacher is still employed." Opinion of Justice Stevens n. 2.

charge at all within 180 days after the occurrence of an alleged unlawful employment practice is nevertheless entitled to the extended 300-day period in which to file his federal charge simply because he lives in a deferral state.

Nevertheless, Respondent argued[2] from dictum in *Mohasco Corp. v. Silver,* 447 U.S. ——, 100 S.Ct. 2486 (1980) (decided before *Ricks*), that this Court had made such a holding under Title VII. The Third Circuit extended that "holding" to the ADEA in this case by ruling that the Respondent is entitled to the longer 300-day filing period solely because he lives in Pennsylvania, a dual-law state.[3] The remarks in *Ricks* emphasize that a writ should be granted to review this extended "holding".

One result of the Third Circuit extending its pre-*Ricks* interpretation of Title VII to the ADEA is that a plaintiff's eligibility for the extended federal filing period depends not upon his filing a complaint with the state agency within either the state limitations period or the normal 180-day federal filing period but upon the vagaries of the laws of the state in which he lives.[4]

As we noted in our Petition, the ADEA's legislative history makes it plain that that is not the correct result under the ADEA.

Moreover, the *Ricks* case strongly indicates that that may not even be the correct application of Title VII.

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2. Respondent's Brief In Opposition at 2-3 (first sentence of Argument).

3. Petition at 16a-17a, 18a.

4. Petition at 9-10, 12.

Justices Stewart, Brennan and Marshall stated in *Ricks* that, had the alternative termination of employment date been considered, Ricks might have been eligible for the 300-day federal filing period depending—not upon the state in which he lived—but "on whether his *filing* of a Complaint with the Delaware Department of Labor entitled him to file with the EEOC [within the extended period]."[5] This underscores the Third Circuit's error in emphasizing merely whether a state was a "deferral state", rather than the plaintiff's actions during the normal federal filing period, to determine a plaintiff's entitlement to the extended federal filing period.

Moreover, these Justices noted that, to qualify for the 300-day period, the Title VII plaintiff "arguably" must "make a timely filing with the state agency".[6] This view, if applied to the ADEA, would also result in the reversal of the Third Circuit's judgment in this case.

The *Ricks* remarks highlight another Third Circuit error. The Third Circuit held that its disposition of the questions of whether an ADEA plaintiff seeking to use the extended 300-day federal filing period must file his state charge either timely or within the normal 180-day federal filing period were "controlled" by this Court's statements in *Mohasco*.[7] To the contrary, the statements in *Ricks* emphasize that—even under Title VII—both of those questions are, at the very least, "open".

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5. (Emphasis added.) Opinion of Justice Stewart, text at n. 2.

6. Opinion of Justice Stewart, n. 2.

7. Petition at 18a.

Moreover, the facts of *Mohasco* did not present or require this Court to decide either question. In *Mohasco,* the plaintiff had made a "timely" state filing[8] and had, in any event, failed to "file" his federal charge within the longer period—even assuming it was the applicable one.

Clearly then, this Court was not even required to resolve in *Mohasco* the very questions under Title VII which the Third Circuit first assumed had been answered and then applied to the ADEA. The remarks in the *Ricks* opinions highlight the errors in the Third Circuit's approach and the importance of this Court granting a writ of certiorari in this case.

The Third Circuit made the same type of error in holding[9] that this Court had ruled in *Oscar Mayer*[10] that an ADEA plaintiff in a dual-law state is entitled to 300 days in which to file a federal charge without regard to when he files a state charge.

Actually, in *Oscar Mayer,* this Court merely ruled that an ADEA plaintiff in a dual-law state must file a charge with the state agency as a mandatory prerequisite to maintaining a federal action. The facts of *Oscar Mayer* did not present the question of whether an untimely state filing made after no charge of any type had been filed in the normal 180 day federal filing period

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8. The New York state limitations period is 365 days. N.Y. Executive Law, app. § 465.3 (McKinney, 1980). *Mohasco Corp. v. Silver,* 447 U.S. ——, 100 S.Ct. 2486, 2489 n. 4 (1980).

9. Petition at 15a-16a.

10. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

would revive and extend plaintiff's expired federal time period.

Indeed, in *Oscar Mayer,* the plaintiff had filed his federal ADEA charge within the normal 180 day federal filing period, a fact which the Third Circuit did not acknowledge. The Third Circuit simply failed to recognize that, in *Oscar Mayer,* the federal filing—done within 180 days—was unquestionably timely and that this Court's statements as to the irrelevance of state limitations period were made in the context of such a timely federal filing. No question concerning the 300-day federal filing period arose in *Oscar Mayer.*

Thus, the circumstances presented in this case—where plaintiff filed no state or federal charge in the normal 180-day federal filing period—were not presented to or ruled upon by this Court in *Oscar Mayer.*

The Third Circuit's application of *Oscar Mayer* out of context and contrary to the legislative history of the ADEA emphasizes that this Court should grant a writ of certiorari in this case.

Moreover, this Court's recent decision in *Ricks*—in which the Respondent's (and the Third Circuit's) broad reading of *Mohasco* was questioned by this entire Court—emphasizes that a writ should be granted in this case so that these recurrent questions under the ADEA may be resolved according to the language and legislative history of the ADEA[11] and not on the basis of

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11. *See,* Sheeder, *Procedural Complexity of the Age Discrimination In Employment Act: An Age-Old Problem,* 18 Duq. L. Rev. 241, 256-261 (1980); Note, *The Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act,* 44 U. Chi. L. Rev. 457, 480 (1977); Note, *The Procedural Requirements Of The Age Discrimination In Employment Act of 1967,* 9 Rut.-Cam. L.J. 540, 558-562 (1978).

erroneous interpretations of footnotes in an opinion interpreting another statute.

Respectfully submitted

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Of Counsel:

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RULE 28.1 STATEMENT (CONT.)

Merck Sharp & Dohme (Europe), Inc.
Merck Sharp & Dohme (Greece), Inc.
Merck Sharp & Dohme Limitada
Merck Sharp & Dohme (I.A.) Corp.
Merck Sharp & Dohme Industria Quimica e
Farmaceutica, Ltda.
Merck Sharp & Dohme Industria Quimica e
Veterinareia, Ltd.
Merck Sharp & Dohme (International) Ltd.
Charles E. Frosst & Co.
Charles E. Frosst (Australia) Pty. Ltd.
MSD (Proprietary) Ltd.
Merck Sharp & Dohme A.G.
Merck Sharp & Dohme, S.A.
Merck Sharp & Dohme Quimica de Colombia S.A.
Mershome Properties Ltd.
Merck Sharp & Dohme (Holdings) Ltd.
Merck Sharp & Dohme Ltd.
Thomas Morson & Son, Ltd.
Merck Sharp & Dohme Internatinal, Inc.
MSD (Japan) Co. Ltd.
Merck Sharp & Dohme de Mexico, S.A. de C.V.
Merck Sharp & Dohme Orthopedics Co., Inc.
Merck Sharp & Dohme (Panama) S.A.
Merck Sharp & Dohme (Asia) Ltd.
Merck Sharp & Dohme (Ltalia) S.p.A.
Merck Sharp & Dohme de Venezuela C.A.
Merck Sharp & Dohme de Puerto Rico, Inc.
Merck Sharp & Dohme (Ireland) Ltd.
Merck Sharp & Dohme (Philippines) Inc.
Metasol Canada Ltd.
Sharp & Dohme GmbH
Solar Laboratories, Inc.
MSD Lakemedel (Scandinavia) AB
MSD Lakemedel (Sweden) AB
Merck Sharp & Dohme KB
Apeco Erik Lindblom & Co., AB
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Supreme Court, U. S.
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No. 80-529

In the Supreme Court of the United States

October Term, 1980

CALGON CORPORATION,
Petitioner

v.

LAWRENCE E. DAVIS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent's Brief In Opposition

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed on August 1, 1980, upon panel rehearing, is reported at 627 F.2d 674. Neither the original opinion of the Court of Appeals, filed on June 10, 1980, nor the opinion of the United States District Court for the Western District of Pennsylvania is officially reported.

STATEMENT OF THE CASE

Respondent, Lawrence E. Davis, was employed by Petitioner, Calgon Corporation, for twenty-one years, rising to the position of Vice President and General Manager of Calgon's Activated Carbon Division. Beginning in March, 1977, when he was 54 years of age, Davis was gradually deprived of corporate responsibilities and privileges at Calgon and was finally terminated, effective June 30, 1978, at the age of 55.

Charging that he had been demoted and terminated solely on account of his age and in furtherance of a planned policy of discrimination by Calgon against its executives between the ages of 55 and 60, Davis filed a complaint with the Pennsylvania Human Relations Commission (PHRC) on January 29, 1979 (213 days after his termination) under Pennsylvania's age-discrimination statute, Pa. Stat. Ann. tit. 43, §§955-957 (Supp. 1964, 1978, and 1979). Ten days later, Davis filed a charge with the Secretary of Labor under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq.* (1976).

Following receipt from the PHRC of a notice of disposition and from the Secretary of Labor of a notice of termination of conciliation efforts, Davis brought an action in the District Court for the Western District of Pennsylvania, alleging that Calgon had violated the ADEA. The District Court dismissed the suit on the ground that Davis's lack of "timely invocation of the State remedy" (App. A at la) deprived him of the right to

avail himself of the 300-day federal filing period otherwise available to plaintiffs in deferral states.[1]

On appeal by Davis, the Third Circuit, although conceding that "the issue is not free from doubt" (App. B at 10a), affirmed the district court's order because Davis did not file his charge with the state agency within 180 days after his termination.

On resubmission to the Third Circuit for panel rehearing following this Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. ___, 100 S.Ct. 2486 (1980), the Court of Appeals reversed its earlier order dismissing the complaint and held instead that Davis's charge filed with the Secretary of Labor within 300 days of termination was timely filed under the ADEA, notwithstanding that the state-agency charge had not been filed within 180 days of his termination. Thereupon, Calgon Corporation petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

This Court's decision in *Mohasco, supra,* has effectively settled the issue here sought to be reviewed; and the Circuit Court opinion on rehearing is in full accord therewith.

The conflicting statutory interpretations which existed among several circuit courts prior to the *Mohasco* ruling have been specifically addressed and reconciled by this Court.

The issue presented by petitioner having thus been resolved, the petition should be denied.

ARGUMENT

1. This Court, in *Mohasco Corp. v. Silver,* has expressly rejected Petitioner's arguments.

In *Mohasco,* a case involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, this Court unequivocally held that so long as proceedings have been instituted with the

[1] Deferral states, such as Pennsylvania, are "States with agencies empowered to remedy age discrimination in employment." *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

appropriate state agency, a complainant is entitled to a full 300 days in which to file his federal charge, even where, as here, the state charge was initiated *more than* 180 days after the alleged unlawful employment practice occurred.

Calgon Corporation insists in the petition now pending that this Court's *Mohasco* holding is limited to Title VII cases and has no application in an ADEA case.[2] The *Mohasco* decision itself expressly stated otherwise. In footnote 16, this Court examined and disapproved the decision of the Eighth Circuit in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975), a Title VII case cited with approval by Calgon in its Circuit Court brief. *Olson* held that, in order to preserve his rights, a complainant must file either his state or federal charge within 180 days of the alleged discriminatory act. In the same footnote, this Court observed that *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), adopted substantially the same approach as *Olson* "under similar provisions in the Age Discrimination in Employment Act," 29 U.S.C. §§621-634. *Mohasco*, 447 U.S. at ___, 100 S. Ct. at 2491. As to both these judicial interpretations, this Court expressed the belief that "the restrictive approach [disallowance of the 300-day filing period] exemplified by *Olson* is not supported by the statute." *Id.*

The Third Circuit in its opinion following rehearing also understood *Mohasco* to have left the issue free from the doubt which had earlier troubled the Circuit Court:

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[2]In its attempt to distinguish *Mohasco*, Calgon's petition asserts that "*Mohasco* dealt with a definitional question unique to Title VII" (Pet. at 3) and emphasizes that the critical differences between the two statutes are more striking than the similarities. Yet Calgon's brief in the Circuit Court, written before this Court decided *Mohasco*, cites at least four Title VII judicial decisions in support of its interpretation of the ADEA filing requirements, contending, moreover, that this interpretation "is consistent with the overwhelming majority of holdings under the *nearly identical* language of Title VII." (Calgon's Brief for Appellee at 23, filed January 17, 1980) Emphasis added.

> While *Mohasco* involved the time limitations of Title VII, we find the Supreme Court's statements equally applicable to the ADEA.
>
> * * *
>
> . . .[W]e find that the Supreme Court's statements in *Mohasco* control disposition of this issue.

Davis v. Calgon, supra, 627 F.2d at 676.

Calgon's claim, in its petition before this Court, that the Third Circuit's ruling is inconsistent with this Court's decision in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), is simply inaccurate. (Pet. at 6, 8, 9). *Oscar Mayer* established the principle that although ADEA requires a complainant to commence state proceedings, it does not require that the filing be timely under state law—an issue of importance in the instant action, since the Pennsylvania Human Relations Act requires the filing of discrimination charges within 90 days after the alleged unlawful act. Moreover, this Court's statement in *Oscar Mayer* confirms the relevancy of the *Mohasco* ruling in an ADEA action:

> Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace; since the language of §14(b) [§633(b) of the ADEA] is almost *in haec verba* with §706(b), and the legislative history of §14(b) indicates that its source was §706(b), we may properly conclude that Congress intended that the construction of §14(b) should follow that of §706(b).

441 U.S. at 756.

Both the Supreme Court's decision in *Mohasco* and the Circuit Court's opinion in the case at issue rest on a plain reading of the statutes involved. The language of both statutes in unambiguous. As this Court observed in *Mohasco*, at 447 U.S. ___, 100 S.Ct. 2491, n.19:

> Congress included no express requirements that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral states.
>
> * * *
>
> . . .[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527. In contrast to the construction of the statute we adopt today, the . . . approach urged upon us by petitioner . . . is not compelled by the plain meaning of the statutory language.

The plain meaning of Section 626(d) of the ADEA was complied with by Respondent Davis, who filed his complaints with the state and federal governments within the time set forth in that section.

2. Opinions relied upon by petitioners have been vacated and remanded by this Court in light of *Mohasco*.

Calgon bases its request for grant of a writ of certiorari primarily on the "irreconcilable conflict" existing between the Third Circuit's decision below and ADEA cases in two other circuit courts disallowing the full 300-day filing period to persons who do not initiate state proceedings within 180 days after termination of employment. *Ciccone v. Textron, Inc., supra*, and *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183 (6th Cir. 1980).

Lest any doubt remain that the *Mohasco* holding directly applies to ADEA cases, we observe that this Court recently granted petitions for certiorari in both *Ciccone* and *Ewald*, vacated the judgments of the First and Sixth Circuits in those cases, and remanded "for further consideration in light of

Mohasco." *Ciccone*, No. 79-1970, 48 L.W. 3288 (October 21, 1980); *Ewald*, No. 80-208, 48 L.W. 3288 (October 21, 1980).

The Ninth Circuit has also addressed the issue presented in this petition, and its decision, in *Bean v. Crocker Nat'l. Bank*, 600 F.2d 754 (9th Cir. 1979), is in accord with the Third Circuit's holding and with *Mohasco.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied and the action remanded for trial.

Respectfully submitted,

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